No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Exceptions to
First Interim Report of the Special Master

DUKE ENERGY CAROLINAS, LLC'S BRIEF IN REPLY TO SOUTH CAROLINA'S EXCEPTIONS TO FIRST INTERIM REPORT

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INTRODUCTION

On October 1, 2007, this Court granted South Carolina's motion for leave to file a bill of complaint against North Carolina. The action seeks an equitable apportionment of the Catawba River. In November 2007, pursuant to Supreme Court Rule 17, Duke Energy Carolinas, LLC ("Duke") sought leave to intervene. This motion was referred to Special Master Kristin Myles, who granted Duke's motion. As the Special Master correctly recognized in her First Interim Report, Duke has compelling interests in the Catawba River waters in both North and South Carolina that give it a direct stake in the River's equitable apportionment and those interests are not represented by either State.

For decades, acting prior to and pursuant to a 50-year license issued in 1958 by the predecessor to the Federal Energy Regulatory Commission ("FERC"), Duke and its predecessors have impounded water from the Catawba in eleven reservoirs located in both States (six in North Carolina, four in South Carolina and one that crosses the border between them) to provide hydroelectric power and other benefits to the region. It is the Duke impoundments along the Catawba River that provide the water that flows into South Carolina during periods of drought and low flow. It is Duke's FERC license that governs the minimum flow of the River into South Carolina in those same times of drought and low flow. It is Duke that brought together over 70 stakeholders in the Catawba River, including governmental units in North and South Carolina, to negotiate the Comprehensive Relicensing Agreement ("CRA") that addresses virtually every conceivable Catawba River water use and management issue as part of Duke's

effort to obtain FERC relicensing. And, it is Duke which would have to implement any equitable apportionment ultimately ordered.

Duke has vital interests in its impounded waters, its operations, its FERC license, and the CRA which forms the basis of its application for FERC relicensing. Indeed, it is Duke's position that the CRA reflects an equitable apportionment of the Catawba River; that if the FERC license is renewed based on the CRA, any equitable apportionment must respect and incorporate the terms of the CRA; and that threats to the CRA imperil Duke's paramount interest in renewal of its FERC license.

As the Special Master found, Duke can protect its compelling interests only by participating in equitable apportionment proceedings as a party. Neither North nor South Carolina can adequately represent Duke's interests in its impounded waters in both States, its operations under its FERC license, and in preserving the negotiated compromise of the CRA. Although the United States asserts that North and South Carolina are both signatories to the CRA and thus will protect it, US Br. 20 n.3, this is simply incorrect. Neither State is a CRA signatory, and South Carolina has "equivocated on whether it intends to challenge the CRA in the action." First Interim Report at 30, *South Carolina* v. *North Carolina*, No. 138 Orig. (Nov. 15, 2008) ("*Interim Report*").[1] Moreover, the CRA is a carefully negotiated compromise; if the equitable apportionment dislodges any part of it, the rest may come undone, threatening the years of work and the substantial

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[1] Both States have agencies which signed the CRA, and the question whether these signatures bind the States themselves has not been decided

investments that underlie Duke's application for license renewal.

This Court's precedent fully supports Duke's intervention. And, the Special Master decision in *Nebraska* v. *Wyoming*, No. 108 Orig., that both South Carolina and the United States rely on in arguing that FERC licensees on rivers should not be permitted to intervene in original equitable apportionment actions, see SC Br. 22-23, US Br. 20 n.3, was in fact *reversed* later in that litigation by that same Special Master when he recognized that no State party fully represented the licensee's specific interests in the flow of the Laramie River. See Seventeenth Memorandum of Special Master on Petition to Intervene of Basin Electric Power Coop., *Nebraska* v. *Wyoming*, No. 108, Orig. (Apr. 2, 1999) (Docket No. 1352) ("*Seventeenth Mem.*") (attached as Addendum). That licensee assumed full party status and was a signatory to the final settlement of that original case. See *infra* at 23-24. The same result should obtain here. This is a matter that should neither be litigated nor settled without Duke's direct participation.

With reservoirs, facilities and customers located in *both* Carolinas, control over the flow of the Catawba, and a FERC license up for renewal based on a web of agreements about the Catawba's flow, Duke's interests are not adequately protected by either State. Duke's interests in the Catawba Basin are region-wide. Duke is not interested in either State's maximization of its share of the River. And, because Duke's interests in the Catawba River are unique, allowing Duke's intervention does not open the intervention door to any citizen who uses the River.

In this setting, the Special Master correctly found that Duke should be permitted to intervene because

it has shown a "compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). Moreover, because of its interests and experience, Duke as a litigant can substantially assist the Court and the Special Master in evaluating the complex issues posed by this case. Duke respectfully requests that the *Interim Report* be adopted and that this Court grant its motion to intervene.

STATEMENT OF THE CASE

1. From 1958 to 2008 (and by FERC extension to the present), see *Duke Power Co.*, 20 F.P.C. 360 (1958) (order issuing license), Duke and its predecessor companies have been licensed to operate a hydroelectric project along the Catawba River. That project now embraces eleven reservoirs located in North and South Carolina to provide hydroelectric power and other benefits to the region. *Interim Report* 3. Duke will not repeat the Statement of South Carolina that details the importance and historic development of the Catawba River basin in both States, and the origins of this original action. Instead, this Statement will provide only the background essential to Duke's motion to intervene.

In the early 20th century, Duke's predecessor, which later became known as Duke Power Company, was founded to provide electric power in the Piedmont region. In 1958, the Federal Power Commission issued to Duke Power Company a 50-year license under Section 4(e) of the Federal Power Act "for the construction, operation and maintenance" of hydroelectric facilities along the Catawba River in

North and South Carolina that constitute Project No. 2232 ("the Project").

The license was expressly made "subject to the terms and conditions of the Act" and "to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act." 20 F.P.C. at 368. The license also required Duke to maintain and grant passage over Duke property to permit public access to each lake created by the Project, *id.* at 370-71. Finally, the license required Duke to release certain minimum water flows at each development in North and South Carolina for purposes specified and in consultation with relevant State agencies. *Id.* at 371-72. (For example, the required minimum average daily flow from Wylie Dam, releasing water into South Carolina, is 411 cubic feet per second ("cfs"). NC App. to Brief in Opposition to South Carolina's Motion for Leave to File Bill of Complaint ("NC App.") 58a.) Duke's initial license expired in August 2008, and Duke is now operating under an interim license. See FERC, Project No. 2332-522, *Notice of Authorization for Continued Project Operation* (Sept. 18, 2008).

Duke's reservoirs along the Catawba allow Duke both to generate hydroelectric power at thirteen hydroelectric generating plants and to supply cooling water for its nuclear power and coal-fired plants in the Catawba basin. Duke's reservoirs effectively control the flow of the Catawba River for these purposes and to control flooding and address drought. Duke's reservoir at Lake Wylie is the source of the Catawba water that flows into South Carolina. See NC App. 1a-5a.

In February 2003, Duke began preparations for applying to FERC for the relicensing of its Project. As North Carolina's brief and declarations in

opposition to the South Carolina's motion for leave to file a bill of complaint ("NC Br.") explain, Duke sought to include all relevant state and private parties to create a consensus concerning the terms for obtaining its new license. NC Br. 2-3. Three years of negotiations led to the 2006 Comprehensive Relicensing Agreement ("CRA") signed by Duke, its corporate parent, and 68 other entities, including the North Carolina Department of Environment and Natural Resources, the South Carolina Department of Natural Resources, other state agencies, public water suppliers, county and municipal governments from both States, industries, interest groups, and individuals. See *id.* at 3. The CRA was not signed by either North or South Carolina.

The CRA is a formal request to FERC to grant Duke's new license under the terms and conditions set forth in that Agreement. *Id.*; see also NC App. 6a, 57a-58a. Duke's actions in securing the CRA served FERC's strong policy favoring the settlement of issues related to the licensing of FPA projects. See Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act, 71 Fed. Reg. 56,520, 56,520 (Sept. 27, 2006) (policy statement) ("Commission looks with great favor on settlements in licensing cases").

It was time-consuming, expensive, and difficult for stakeholders in the Catawba River basin to reach agreement on the proposed terms for FERC's issuance of Duke's new license – a license that Duke must obtain in order to continue to conduct its operations under the FPA. And, many of the provisions of that new license will involve factors that, as explained below, are directly relevant to the equitable-apportionment analysis. For example, the CRA would establish the minimum continuous flow

from Lake Wylie in a variety of settings, from sustained inflow periods (1,300 cfs), to no drought (1,100 cfs) through Stage 1 (860 cfs), Stage 2 (720 cfs), and Stages 3 and 4 (700 cfs) drought conditions. NC Br. 3-4; NC App. 57a-58a, 7a. This represents a significant increase from the 411 cfs minimum average daily flow required under the current license.

The CRA also establishes a Low Inflow Protocol ("LIP") for entities that use or withdraw water from the Catawba. See NC App. 6a-7a, 58a. The protocol requires certain entities in both North and South Carolina to take increasingly stringent conservation measures as drought conditions become more severe. *Id.* The LIP was voluntarily put into effect in August 2006, ahead of the date specified in the CRA. As one of South Carolina's climatologists recently stated, after five counties within the Catawba Basin had their drought status downgraded from severe to moderate, "'[t]he key to that downgrade is the Low Inflow Protocol.' . . . 'That was the driving factor.'" John Marks, *Duke System Helps Drought*, Lake Wylie Pilot, Feb. 21, 2009, *available at http://www.lakewyliepilot.com/409/story/283655.html*.

Duke filed its license application with FERC on August 29, 2006. As noted, FERC has not ruled on that application, and Duke is under an interim license. If the application for a license is accepted and the terms of the new license go into effect, the issues of equitable apportionment confronting this Court and the Special Master will have to be addressed in the context of the new license's minimum daily flow and other requirements.

Numerous businesses and communities in the Catawba basin rely on the River and on Duke's hydroelectric facilities and other operations. All parties agree that the Catawba, including the power

generated by Duke's facilities, is critical to the economies and communities of the basin now and for the foreseeable future. All parties further agree that the region has been periodically subject to drought, with damaging consequences for the Catawba's flow. These considerations were crucial in the multi-party negotiations that led to the CRA and its LIP submitted to FERC by Duke. The same considerations will be central to the equitable-apportionment analysis of this Court.

2. Although North and South Carolina have long worked out their differences concerning the Catawba River, the severe drought that occurred from 1998 through 2002, and subsequent drought conditions, led to the initiation of this lawsuit. Both North and South Carolina have statutes that permit state agencies to authorize transfers of water from one river basin to another. See N.C. Gen. Stat. § 143-215.22L; S.C. Code Ann. §§ 49-21-10 to -80. North Carolina, through its Environmental Management Commission ("EMC"), has utilized its authority under its Interbasin Transfer Statute to approve transfers of water from the Catawba River to other river basins.

On January 10, 2007, the EMC granted in part an application for a transfer of water from the Catawba over the objection of South Carolina. SC Br. 6. On June 8, 2007, South Carolina filed its motion for leave to file the bill of complaint, seeking an equitable apportionment of the Catawba River.

This Court granted South Carolina's motion on October 1, 2007. Duke then sought to intervene pursuant to this Court's Rule 17 because any equitable apportionment of the Catawba River will directly affect Duke's legal rights, contract and property interests, obligations, and operations in

connection with the waters of that River. Duke's motion, along with motions to intervene from the Catawba River Water Supply Project ("CRWSP") and the City of Charlotte, North Carolina ("Charlotte") were referred to the Special Master.

3. After full briefing and a hearing, the Special Master issued a decision concluding that Duke should be permitted to intervene. The Special Master described Duke's unique compelling interests in defending the terms of its current license and the CRA. See *Interim Report* 30-31. She stated that "there is a strong possibility that the terms agreed to by the relevant stakeholders in the CRA will be directly at issue in this litigation, thus triggering Duke's direct interest in preserving that agreement and its existing and prospective licenses." *Id.* at 30. She also reasoned that "[i]f the scientific data and conclusions that support the CRA, which in turn is the principal support for Duke's license application, will be placed in issue, it would seem fair and equitable to allow Duke to defend those data and conclusions, as well as the CRA and the license application themselves." *Id.* at 31.

The Special Master recognized that Duke's hydroelectric plants and reservoirs "effectively control the flow of the Catawba." *Id.* at 28. The Report explained that "because Duke controls the flow of the Catawba River . . . any Court-ordered alteration of the flow would be carried out by Duke and would directly affect its operations." *Id.* at 29; see *id.* at 11 (the CRA's "flow requirements—and not solely the uses of water by North Carolina immediately govern how much water from the Catawba makes its way into South Carolina").

The Special Master found the combination of Duke interests compelling and sufficient to warrant Duke's

intervention, and further noted that Duke's participation would "provide a direct link to the CRA negotiations process and the FERC proceedings that will foster 'a full exposition of the issues.'" *Id.* at 30.[2]

After the Special Master issued her decision, the parties began negotiating a Case Management Order. In addition, document discovery began. South Carolina served comprehensive document requests on Duke, which illustrate the extent to which Duke's interests are broadly affected by this case.

Thereafter, South Carolina filed a motion requesting that the Special Master clarify that Duke, CRWSP, and Charlotte were intervenors "solely for limited purposes." SC Mot. 2 (emphasis omitted). If the Special Master's Order granting intervention were interpreted to allow Duke a more robust role, including participation in the liability phase of the proceedings, then South Carolina asked that the Order be reconsidered and that intervention be denied. *Id.* The Special Master denied that motion on July 17, 2008.

On August 22, 2008, the Special Master granted South Carolina's request that she submit an Interim Report addressing intervention to this Court. In that Report, the Special Master explained her denial of South Carolina's motion for clarification or reconsideration. She stated that while Intervenors surely had an interest in the outcome of this action,

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[2] The Special Master declined to make Duke's role in serving the public interest as a FERC licensee a "factor" in her decision authorizing intervention because she concluded that Duke serviced the public interest solely by complying with its License. *See Interim Report* 31 n.3. Duke continues to believe the public interests served by its license support its argument that its interests are compelling. *See infra* at 32-33.

that did "not mean that the[ir] only interest . . . is in the remedial phase." *Interim Report* 34. "Rather, as with any litigant, they have an interest in the liability proceedings that could lead to the adverse result . . . ." *Id.* In addition, she pointed out that Intervenors would have an interest in whether South Carolina had shown in Phase I (the liability phase) that it was suffering harm "from the Intervenors' own activities." *Id.* at 34-35.

The Special Master recognized that Intervenors are limited to the extent that their "participation . . . should be directed toward protecting that intervenor's interests and not as a means to litigate all aspects of the dispute, even those that do not affect the intervenor." *Id.* at 34. She indicated that she would address particular objections to Intervenor participation beyond the reasonable limits imposed by their interests through case management. *Id.*

SUMMARY OF ARGUMENT

Where, as here, a private party has "compelling interest[s]" that are not adequately represented by a party state, that party is permitted to intervene in an original action that will directly affect those interests. *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). The Special Master correctly concluded that Duke has a unique and compelling amalgam of interests, rights and obligations related to the waters of the Catawba River that are not adequately represented by either party State. These interests would be directly affected and are potentially endangered by any equitable apportionment of the Catawba River, and can only effectively be protected by allowing Duke to intervene as a party to this dispute.

In response, South Carolina and the United States argue that the Special Master derived the incorrect test from this Court's prior decisions and wrongly determined that Duke should be permitted to intervene. First, South Carolina is simply wrong when it claims that the Special Master ignored the requirement that no state adequately can represent the putative intervenor's interests. Instead, she rightly concluded that under this Court's cases, a private party may intervene even where it does not have a disabling conflict of interest with a party state.

In addition, the Special Master correctly found that this Court's decisions authorizing intervention, including *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), and *Arizona* v. *California*, 460 U.S. 605 (1983), apply to equitable apportionment cases and strongly support Duke's intervention here. South Carolina and the United States rely on the Special Master's exclusion of the hydroelectric licensee, Basin Electric, from the original action apportioning the North Platte River in this Court; but that case ultimately supports Duke's intervention here. When it became clear that the Laramie River's flow and Basin's water rights were implicated by the apportionment of the North Platte, the Special Master reversed himself and granted Basin's motion to intervene. See *infra* at 23-24. Basin was a party to the final resolution in *Nebraska* v. *Wyoming*, 534 U.S. 40 (2001). Duke's situation is closely analogous to Basin's.

The arguments objecting to Duke's intervention are without merit. North Carolina cannot adequately represent Duke's interests, which involve the entirety of the Catawba basin and do not seek to increase either State's portion at the expense of the other.

Instead, Duke seeks to represent its wholly separate and compelling interests in the Catawba – its bi-state reservoir operations, its investments in the compromise of the CRA and the relicensing process, its FERC license and its impounded waters. North Carolina has no analogous stake in any of these items. Nor, properly understood, can these interests be categorized as those of a mere water user in a single state. Duke does not seek to intervene to protect or increase its share of water, but to preserve and fulfill the conditions of the CRA and its FERC license, with the multiplicity of uses and understandings embodied therein.

Finally, none of the factors that often militate against intervention applies to Duke, and Duke is situated to be both helpful to the proceedings and essential to any remedy. Duke's unique circumstances and interests ensure that its intervention will not open the door to others. It does not seek to litigate claims beyond those already in the case or to address matters that do not relate to its specific interests. And Duke's management of the CRA process provide it with resources and information that are directly relevant to the equitable apportionment question (and that reveal the direct impact of any equitable apportionment on Duke's interests). In these circumstances, the Special Master's determination that admitting Duke as a party was warranted and would materially assist her conduct of this litigation was fully supported. Her recommendation should be accepted and Duke's motion should be granted.

ARGUMENT

THE SPECIAL MASTER'S DECISION IS CORRECT AND DUKE'S MOTION TO INTERVENE SHOULD BE GRANTED.

This Court has recognized that parties other than states and the United States may have "compelling interests" that are not represented by a party state, and that those parties should be permitted to intervene in original cases that will directly affect that interest. *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). In opposing Duke's intervention, South Carolina and the United States argue that (i) the Special Master applied the wrong legal standard for intervention, and (ii) under the correct standard, Duke's motion should be denied. Both arguments are wrong.

A. The Report Uses The Correct Standard.

1. The Special Master Did Not Invent A New Test For Intervention.

Both South Carolina and the United States spend a number of pages demonstrating that intervention by private parties in original actions is unusual and that intervenors must satisfy the *New Jersey* test. Neither the Special Master nor Duke has any quarrel with that standard.

Unhappy with the Special Master's careful reading of this Court's cases and her application of the *New Jersey* test for intervention, however, South Carolina and the United States seek to persuade this Court that the Special Master invented a new test for intervention that omits consideration of whether the putative intervenor's interest is "adequately represented" by a party state. A fair reading of the

Interim Report reveals that this accusation is baseless.

First, the Special Master recites the *New Jersey* test, *Interim Report* 13, highlighting the requirement that the putative intervenor's interests must be "'apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *Id.* (quoting *New Jersey*, 345 U.S. at 373).

In applying her distillation of the case law, the Special Master specifically discussed the requirement that the "proposed intervenor" not be "'properly represented by the state.'" See, *e.g.*, *id.* at 23 (quoting *New Jersey*, 345 U.S. at 373). It was in this context that the Special Master stated that in order to grant intervention, the Court does *not* require a "conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's interests." *Id.* at 23. This is *not* a rejection of the no-adequate-state-representation requirement. It means only that the Court can find (and has found) that a state does not adequately represent a private party's interests without finding a disabling conflict of interest. Put differently, a state can be an inadequate representative of a private party's interests even without any directly conflicting interest where the intervenor has "'concrete'" interests that are not fully represented by a party state. See *id.* at 13 (discussing *New Jersey*, and this Court's statement that Philadelphia was denied intervention because it was "'unable to point out a single concrete consideration in respect to which the Commonwealth's

position does not represent Philadelphia's interests'").[3]

Thus, the Special Master read this Court's cases to hold that, even when a putative intervenor has some interests that "align" with those of a party state, on occasion a non-state party has an interest that is unique and so compelling that the party state does not adequately represent that non-state party's interests. And, she recited as potential examples circumstances where the non-state entity (i) is the "instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief," (ii) has "an independent property interest that is directly implicated by the original dispute or a substantial factor in the dispute," or (iii) has "a 'direct stake' in the outcome of the action." *Id.* at 21.

In doing so, the Special Master was neither rejecting the no-adequate-state-representation requirement nor suggesting that intervention is warranted any time one of these conditions is met. Instead, she was explaining the types of compelling specific interests which this Court has found may not be adequately represented by the *parens patriae*.

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[3] South Carolina cites the quoted language in its argument (Br. 26) that this Court intended to require a disabling conflict of interest in order to permit intervention. But, the Special Master concluded that the requirement of a "concrete consideration" demonstrating difference falls far short of a requirement for a disabling conflict of interest. For example, in *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981), the oil pipelines permitted to intervene were the entities that suffered under the illegal tax and they were perceived to have an interest sufficiently different from that of the party states to warrant intervenor status in light of the directness of the injury.

The Special Master applied the standard for intervention set forth in *New Jersey*, including the requirement that no state party adequately represent the putative intervenor's interest. Both South Carolina and the United States disagree with the Special Master's view about how that factor applies to specific cases (a separate issue addressed *infra*). But the argument that the Special Master simply ignored a relevant factor is wrong.

2. The Standard For Intervention In Equitable Apportionment Actions Is Identical To That In Other Original Actions.

(a) Before the Special Master, South Carolina argued that intervention by non-sovereigns is *never* allowed in equitable apportionment cases. In this Court, South Carolina has softened its stance, arguing that the already-stringent standard for intervention in original actions is further heightened in equitable-apportionment cases. SC Br. 21. As the Special Master concluded, there is no legal or factual basis for asserting that equitable apportionment cases differ from other original actions such that intervention should be more difficult. See *Interim Report* 24 ("There is no special rule applicable only to equitable apportionment cases ....").

The Court has limited non-state parties' intervention in original actions in order to protect the states' Eleventh Amendment right not to be sued by private parties absent consent and to prevent original actions from becoming unwieldy class actions. See, *e.g.*, *Arizona* v. *California*, 460 U.S. 605, 614 (1983); *New Jersey*, 345 U.S. at 374-75. These concerns are equally important in all original cases. South Carolina seeks to narrow this Court's intervention test in the equitable-apportionment setting because

this Court's decisions granting intervention in other types of original actions strongly support Duke's intervention here.

For example, in *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981), eight states filed an original action against Louisiana, asserting that a tax that it imposed on natural gas shipped into the State was invalid. The Court allowed 17 natural gas pipeline companies subject to the tax to intervene, explaining:

> Given that the Tax is directly imposed on the owner of imported gas and that pipelines must often own the gas, those companies have a direct stake in the controversy and in the interest of a full exploration of the issue, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. [*Id.*][1]

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[1] South Carolina seeks to distinguish *Maryland* v. *Louisiana* on the ground that the pipeline-intervenors were incorporated and maintained principal places of business in non-party states. SC Br. 34-35. But that was not the basis for the Court's decision granting intervention; it was instead the pipelines' direct stake in the controversy based on the imposition of the tax on their operations in the party state. And it was that direct stake that made the party state's representation inadequate, not the pipelines' incorporation elsewhere. The United States insinuates that sovereignty interests are somehow more important in an equitable apportionment case than in a case asserting unlawful taxation. US Br. 15-16. This argument is neither intuitively obvious, nor supported by the cases. Clearly, states feel impingements on their sovereign prerogatives in multiple areas, including boundary disputes, taxation, and water division.

See also *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (granting intervention to private parties whose lands were directly affected by a boundary dispute).[5]

These cases are directly on point. For over 100 years, Duke has impounded and controlled the flow of water in the Catawba in both Carolinas. Any equitable apportionment will be directly imposed on Duke's impounded water and its operations. Equally to the point, Duke's compelling interests are threatened by any equitable apportionment that is inconsistent with either its FERC license or with the CRA that is the fundamental basis of Duke's application for license renewal.

South Carolina and the United States also derogate Duke's reliance on *Arizona* v. *California*, which is an equitable apportionment case in which intervention of non-state parties was allowed. They claim that the Court authorized intervention solely as a result of the intervenor tribes' sovereign nature. SC Br. 23; US Br. 15. But, this Court's decision makes clear that the tribes were permitted to intervene because their "interests in the waters of the Colorado basin have been and will continue to be determined in this litigation." 460 U.S. at 614-15. Duke is in a position directly analogous to that of the tribes. It has special rights and obligations in the Catawba under its FERC license, the CRA and state law. And, unlike

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[5] South Carolina argues that it can distinguish *Oklahoma* v. *Texas* as well as other original cases involving real property in which intervention by property owners is authorized. SC Br. 32-33 & n.23. The problem is that nothing in these cases suggests that the intervention was granted because real property was at stake. Indeed, *Oklahoma* v. *Texas* is inconsistent with South Carolina's claim (*Id.* at 32-33) that intervention is permitted only when the non-state party's interest is in conflict with that of the state.

the tribes, which were represented by the United States when they intervened, *id.*, no party represents Duke's interests here.

Although South Carolina and the United States seek to pigeonhole each case allowing intervention to its particular circumstances, the overall significance of the relevant body of cases is that intervention is permitted if the *New Jersey* test is satisfied and the putative intervenor is not attempting to expand the claims before the Court. Duke satisfies the framework of *New Jersey* and surpasses the requirements as applied in *Maryland* v. *Louisiana*, *Arizona* v. *California*, and *Texas* v. *Oklahoma*.

South Carolina and the United States attack the Special Master for supporting her decision by citing original cases in which non-state parties were joined by means other than intervention. SC Br. 29-31; US Br. 17-19. The context of the Special Master's analysis is directly relevant here; she was addressing South Carolina's argument that intervention is never appropriate in equitable apportionment cases. These cases demonstrate that there is no constitutional barrier to third-party participation in such cases. Moreover, the Interim Report recognizes that there is a distinction between intervention and joinder, but cites these cases to highlight that (i) there is no constitutional barrier to the presence of non-state parties in equitable apportionment actions within the Court's original jurisdiction so long as the complaint is not thereby expanded beyond the inter-state conflict, and (ii) the Court could have excluded these non-state parties had it concluded that their presence did not further the litigation. See *Interim Report* 16-17, 38-39. The presence of non-state parties in original equitable apportionment cases, in fact, suggests that this Court defers to the Special

Master's judgments about the importance of those parties' interests and the efficient conduct of the litigation, at least where there is no constitutional objection to the non-state party's presence.

(b) South Carolina and the United States also argue that this Court's discussion of the rights of private water users vis-à-vis the States demonstrates that the standard for intervention in equitable apportionment actions is higher. For example, they argue that the state-law rights of a "'private appropriator'" of water within a state "'can rise no higher than those [of the State] and an adjudication of the [State's] rights will necessarily bind him.'" SC Br. 24 (second alteration in original) (quoting *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935)); see also US Br. 11-12.

These cases do not suggest any alteration in the standard for intervention by private parties; they show only that a mere water user does not meet the *New Jersey* standard. As we have shown, however, Duke is not simply an intrastate water user, whose rights and interests can be protected by state law and intra-state allocations in response to an equitable apportionment order, as our opponents' briefs suggest. See also *infra* at 33-35. Duke's interests are inter-state and federal in nature; neither its FERC license nor the CRA nor its impounded waters are the subject of any intra-state dispute. These cases simply have no application to Duke.

South Carolina and the United States return to this point in arguing that the Special Master has misread the Court's cases allowing joinder of instrumentalities authorized to carry out the wrongful conduct challenged by a plaintiff state. See SC Br. 28-29; US Br. 17-19. They claim that such non-state entities ceased to be joined to equitable apportionment cases

after this Court clarified that "'individual water claimants'" are bound by decrees affecting the party states. SC Br. 29. But, Duke is not seeking to intervene as an intra-state water user or claimant. And, Duke's role as the instrumentality of the alleged wrongful conduct is critical here: Duke controls the flow of the Catawba into South Carolina pursuant to its FERC license. If South Carolina claims that it is not receiving enough water, that is because the flow through Duke's Lake Wylie reservoir – a flow determined by its federal license and the CRA – is allegedly insufficient. If this Court orders an equitable apportionment that differs from its FERC license, Duke will face conflicting federal mandates. Duke will defend the terms of its federal license and the CRA and argue against inconsistent apportionment under federal common law. Those arguments should be heard by the Court before any decision concerning equitable allocation is made. Duke's operations on the River under its FERC license are directly affected by this proceeding.

(c) Finally, in arguing that intervention in equitable apportionment cases is different, South Carolina places new and particular reliance on the Court's affirmance of the First Interim Report of the Special Master in *Nebraska* v. *Wyoming*, 507 U.S. 584 (1993). SC Br. 22. That Report recommended denial of the motions to intervene of a number of non-state parties, including the Wyoming-based Basin Electric Power Cooperative ("Basin" or "Basin Electric"), on the ground that Wyoming could represent Basin's interests. *Id.* In fact, this case strongly supports Duke's motion.

In 1988, Basin Electric first sought to intervene in the apportionment of the Platte River "to protect its water rights in the Laramie River, a key tributary [of

the Platte], associated with the Grayrocks Dam and Reservoir, opened in conjunction with Basin's large coal-fired power plant." Final Report of the Special Master at 12, *Nebraska* v. *Wyoming*, No. 108, Orig. (Oct. 12, 2001) ("*Final Report*"). The Special Master denied this motion. But in 1993, this Court "opened the door for Nebraska to bring a modification case to achieve an apportionment of the lower Laramie River between the State of Wyoming and the State of Nebraska." *Seventeenth Mem.*, Add. 4. This decision, in turn, made the Laramie River and a 1978 Settlement Agreement between Nebraska, Basin and the United States concerning the flow of the Laramie relevant to the North Platte case. *Id.*

As a result, the Special Master found that

> the Court's decision in 1993 suggests that we will proceed to trial on Laramie River issues, that Basin's operations on the Laramie and its stake in Laramie waters are key to the disposition of those issues, that neither Wyoming nor Nebraska can adequately represent Basin as *parens patriae*, and that evidence Basin can offer may be important to crafting the final decree in this case and to my recommendations whether the Court should in some manner incorporate the 1978 Settlement Agreement into the North Platte decree. [*Id.*, Add. 4-5.]

The Special Master thus found that Basin had a "direct stake" in the apportionment and *granted* Basin's renewed motion to intervene as "a party for the purpose of litigating the Laramie River issues in this action" and noted that it "play[ed] an important role" in the action. *Final Report* 12; *id.* at 3 n.4 (citing *Seventeenth Mem.*). See *id.* at 21 ("[i]n March of 1999, I finally permitted Basin Electric to intervene as a party for the limited purpose of

protecting its interests in the Laramie River, where it operates the Grayrocks Reservoir and its associated electric generating station) (citing Order (Mar. 26, 1999) (Docket No. 1348)). Indeed, the Master noted that "[h]ad this action gone to trial, Basin Electric would have played a key role on the Laramie River issues, which became important after the 1993 Court opened the door to possible relief for Nebraska on the lower Laramie." *Id.* Basin is a party signatory to the Final Settlement Agreement endorsed by the Special Master, and approved by this Court in 2001. See 534 U.S. at 40-41.

Duke's situation is closely analogous. Indeed, its status as a licensee for power generation and controller of the River's flow, and its significant interests in a possible settlement agreement uncannily resemble the circumstances that resulted in Basin's intervenor status.

B. Duke Has Compelling Interests Not Represented By Either Party State That Would Be Directly Affected By Equitable Apportionment Of The Catawba River.

In addressing equitable apportionment, this Court applies federal common law. See *Virginia* v. *Maryland*, 540 U.S. 56, 74 n.9 (2003). This Court will make "an informed judgment on consideration of many factors." *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945). This Court's oft-quoted enumeration of apportionment principles provides a sense of the complexity of the inquiry:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors .... [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of

> return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made. [*Id.*]

Duke's pervasive presence on the River now and for more than 100 years – its facilities, operations and water use – will play a central role in virtually every factor of the equitable apportionment inquiry. Its current and new FERC license will color any assessment of the relative benefits and costs of Duke's water control and usage at multiple locations on the River in order to serve the businesses and communities dependent upon Duke's operations. The terms of that license will govern the minimum flow of the River in a variety of circumstances. An assessment essentially identical to that made in equitable apportionment has recently been conducted by Duke and 68 other Catawba stakeholders in negotiating the CRA. Duke invested substantial time and millions of dollars in this process, demonstrating its compelling interest in both its FERC license renewal and in all decisions affecting the flow and use of the Catawba.

Moreover, although the Court interprets and creates federal common law in apportionment cases, state law does provide a source for principles that the Court uses to craft that common law. See, *e.g.*, *Connecticut* v. *Massachusetts*, 282 U.S. 660, 670-71 (1931) (Court's equitable apportionment is based in

part "upon a consideration of the pertinent laws of the contending States and all other relevant facts"). Under North Carolina law, Duke, as an impounder of water, has "a right of withdrawal of excess volume of water attributable to the impoundment." N.C. Gen. Stat. § 143-215.44(a). That right, too, is potentially affected by an equitable apportionment that requires Duke to release excess impounded water. And, the use of impounded water is the only way to address the need to stabilize the flow of the Catawba.

South Carolina and the United States do not appear to deny that Duke controls the flow of the Catawba, that any Court-ordered alteration of the flow would be carried out by Duke, that Duke has a strong interest in defending its FERC license, the CRA and its efforts to obtain a license renewal, and that Duke would be subject to conflicting obligations if any apportionment conflicts with the CRA or its license. Instead, they make a series of arguments seeking to minimize those interests.

1. Duke's Interests Are Not Adequately Represented By North Carolina.

First, South Carolina claims that Duke's interests in protecting the CRA and in its license renewal are fully represented by North Carolina. SC Br. 47. North Carolina supports Duke's application for license renewal under the terms of the CRA, but North Carolina is not seeking a FERC license. North Carolina did not spend millions developing the consensus necessary to apply for license renewal.

If the equitable apportionment conflicts with the CRA, and affected signatories – including North Carolina entities – walk away from that Agreement, it is not North Carolina that faces a threat to its license renewal and operations. Duke has a property

interest in its current license, which North Carolina does not; and Duke has compelling interests in securing a renewal of that license, which North Carolina does not fully share.

South Carolina makes much of North Carolina's citations of the CRA. But North Carolina cited those provisions, and their proposed protection of certain minimum flows into South Carolina, as a reason for this Court to deny the motion for leave to file a bill of complaint (because the CRA would provide South Carolina with adequate flow). North Carolina certainly did not characterize the CRA as the correct resolution of any equitable apportionment case. If the CRA is called into doubt by these proceedings, North Carolina will likely seek to maximize its portion, just as South Carolina – not a signatory to the CRA, *supra* at 2 – surely will.

South Carolina states that if North Carolina seeks to maximize its portion, that "raises an intramural dispute between Duke and North Carolina over how North Carolina law will apportion that State's equitable share of water among its users." SC Br. 48. Nothing could be further from Duke's meaning. The CRA does not allocate water for Duke's use; it establishes requirements for the flow of the River at various stages of low flow or drought, and it reflects assumptions about appropriate uses by others over the length of the Catawba in both States during a variety of conditions.

In fact, Duke is arguing that both North and South Carolina's efforts to maximize their allocations would disadvantage Duke *because it would threaten the consensus embodied in the CRA*. If North Carolina were to argue successfully that South Carolina is entitled to less than the CRA provides under the Low Inflow Protocol, then the consensus that led to the

CRA could evaporate and with it, a critical component of Duke's effort for FERC license renewal. The same loss of consensus could occur if South Carolina were to succeed in demonstrating that it was entitled to a greater flow than that provided in the CRA.[6]

Neither State has the stake that Duke has in preserving the multi-party consensus that is embodied in the CRA. Duke has reservoirs, public and private interests, customers and regulators in both States. Duke's position is that whatever equitable apportionment is ordered, the terms of the CRA – the product of a three-year process in which participants moved away from seeking simply to maximize their own positions and toward an acceptable interest-based compromise – should be protected so that Duke can maintain its operations in the Catawba basin.

That is why South Carolina's citation of *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), see SC Br. 18, is wholly inapt. Indiana was deemed to represent the interests of all its citizens in the building of a bridge to Indiana, and thus its position that the bridge should be built was dispositive and binding on its citizens. For purposes of this analogy, Duke is akin to a person who is a citizen of both Kentucky and Indiana, subject to regulation by both States, with a federal

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[6] South Carolina claims that Duke's "status as a signatory to the CRA" would provide no practical limit on the number of potential intervenors. SC Br. 49 n.35. This would be true if Duke were merely a signatory. In fact, Duke initiated and will implement the CRA; and it is the basis of Duke's application for renewal of its FERC license. This fact makes the CRA far more critical to Duke than to other signatories and differentiates Duke from all other signatories, whose individual interests Duke does not purport to represent.

contract requiring him to build the bridge. Both the nature and federal source of its interests set Duke apart from the party States.

2. Duke's Interests In The CRA And Its FERC License Are Compelling And Justify Intervention.

South Carolina and the United States also argue that Duke's interests in the CRA and its pending FERC license are not sufficiently compelling to support intervention.

(a) *The CRA.* Initially, South Carolina claims that there is only a "hypothetical danger of a conflict between Duke's prospective license and equitable apportionment" and that "FERC's consistent practice has been to craft licenses so as not to intrude on any equitable apportionment." SC Br. 51. In fact, FERC is expected to act on Duke's license renewal during 2009, and before any equitable apportionment ruling by this Court. The danger, which is not hypothetical, is that the parties will seek an equitable apportionment that is inconsistent with Duke's current or future FERC license. Only Duke among the parties will be concerned with the relationship between the FPA and its regulations, its FERC licenses, and the federal common law governing equitable apportionment. Only Duke has a compelling set of rights and interests to protect that arises from its status as a federal licensee.

South Carolina next notes that the CRA does not purport to "control any of the disputed water consumption in North Carolina," *id.* at 51; but that fact does not diminish the direct relationship between the CRA and equitable apportionment. The CRA is a complex agreement based on a set of understandings about water use and management in North and

South Carolina; it does purport to address consumption issues in both States at various Stages of the LIP. It also sets rates of flow into South Carolina at various reservoir and drought levels. If the equitable apportionment disallows water uses on which the CRA is based or requires that South Carolina get a higher or lower daily flow rate than does the CRA, that apportionment will conflict with the CRA and the expected terms of the Duke federal license.[7]

South Carolina's further contention that its success in increasing its share will simply make it easier for Duke to "comply with its federal license obligations," *id.*, is plainly wrong for numerous reasons. First, this assumes that South Carolina will prevail and that the ultimate equitable apportionment, if any, will not award more water to North Carolina than the CRA contemplates that it will use. That is not the

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[7] Duke agrees that its interest in defending the "scientific data and conclusions" that underlie the CRA is not independently sufficient to support intervention and that FERC will evaluate the validity of the analysis underlying Duke's application. *See* SC Br. 52. But that science – which Duke knows best – is directly relevant to the CRA, the FERC license, and equitable apportionment. Thus, for example, South Carolina states that Duke's model predicted four months at LIP Stage 3, *id.* at 5, in fact, the model predicted six months, *see Application for New License*, Book 2, Volume 1, at PM&E 25 and PM&E 26. The model did not anticipate the extraordinary drought the region is now suffering; but, as noted, *supra* at 7, the LIP is effectively operating to reduce the drought's ill effects which was its primary purpose. In any event, Duke's substantial interests in the CRA and the FERC license independently support intervention and Duke's intimate knowledge of the water conditions will promote rather than hinder the efficient resolution of this dispute.

inevitable outcome of this case.[8] Second, South Carolina ignores that under the CRA, Duke has obligations to North Carolina as well as to South Carolina, and that any equitable apportionment that awards more water to South Carolina could easily be inconsistent with those obligations and disrupt the CRA and Duke's relicensing effort.

Finally, Duke does not yet know, *inter alia*, whether South Carolina is claiming that it will suffer substantial harm (and thus be entitled to seek an equitable apportionment) if the CRA is approved by FERC. Duke does know that South Carolina is pursuing this litigation despite the CRA and its endorsement by governmental entities in both North and South Carolina (though not by South Carolina itself). The logical inference from this is that South Carolina believes that it will suffer substantial harm even under an approved CRA. That places South Carolina directly in opposition to legitimate interests of Duke identified by the Special Master.

(b) *Duke's FERC License.* South Carolina and the United States try to persuade this Court that Duke's status as a FERC licensee is irrelevant to its motion to intervene. SC Br. 50; US Br. 20 n.3. Instead, they say, Duke has only a "parochial interest in controlling the Catawba River's flow in such a way as to maximize shareholder profits." SC Br. 50. Initially, Duke notes that this fact would not distinguish it from the gas pipelines permitted to intervene to challenge the energy tax at issue in *Maryland* v.

[8] In fact, under normal conditions, the CRA provides more than twice the flow that the current license sets for South Carolina; even in the worst-case, low-flow scenario, the CRA provides more flow into South Carolina than the current license establishes. *See supra* at 5-7.

Louisiana or the property holders permitted to intervene to protect their property interests in *Texas* v. *Oklahoma*. See *supra* at 18-19. The fact that Duke seeks to run its business profitably does not mean that Duke lacks compelling interests supporting intervention. But, in all events, this attempt to disparage Duke's interests as profit-seeking ignores its distinct role as a FERC licensee.

Under § 4(e) of the FPA, FERC is authorized and empowered to issue licenses, including licenses for dams, reservoirs, and other projects for the development of power from streams and other bodies of water. In doing so, the Commission, "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . , the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). See also *id.* § 803(a)(1); *id.* § 808(a); *Udall* v. *FPC*, 387 U.S. 428, 450 (1967) (FERC must determine whether a hydroelectric project will be in the public interest as a whole).

To implement this statutory mandate, FERC includes within its licenses numerous conditions and requirements that the licensee serve the public interest as defined by FERC. The FERC licensee, in turn, is bound by the FPA and by the terms of its FERC license. See *Alabama Power Co.* v. *FPC*, 128 F.2d 280, 293 (D.C. Cir. 1942) ("The grant of [the license] may be made subject to conditions appropriate to safeguard the interest of the public. Having received its license subject to such conditions, . . . the Company cannot shuck off its obligations as a licensee . . . .") (footnote omitted). See also 16

U.S.C. § 799; *id.* § 803(a)(1); *id.* § 808(a)(3)(B) (role of public interest in license renewal).

In light of this federal scheme and the particular licensing obligations imposed on Duke that directly affect the Catawba flow, it is simply wrong to contend that Duke's interests are neither compelling nor different from other users of the Catawba. As the Special Master in *Nebraska* v. *Wyoming* explained in concluding that Basin Electric had a "direct stake" and thus should be permitted to intervene in the equitable apportionment of the Platte River and its tributaries,

> Basin's operations on the Laramie and its stake in Laramie waters are key to the disposition of those issues, . . . neither Wyoming nor Nebraska can adequately represent Basin as *parens patriae*, and . . . evidence Basin can offer may be important to crafting the final decree in this case. [*Seventeenth Mem.* Add. 4-5.]

This analysis applies fully to Duke.

Federal law imposes on Duke specific rights and obligations in connection with its license, issued in the public interest, and gives Duke substantial concrete interests in the River. Duke's interests with respect to the Catawba are therefore both compelling and unique.

3. Duke Is Not Just Another Water User.

South Carolina and the United States attempt to dismiss Duke's interests as only those of any large water user. But, Duke plainly is not equivalent to "'[l]arge industrial plants'" or to a municipality located in a single state, or to other individual claimants within states seeking preservation or

enlargement of their shares of the river. SC Br. 47 (alteration in original). Duke is neither located within a single State, nor seeking to protect or enlarge its *share* of the River. In fact, Duke is seeking to protect and fulfill its FERC license and a delicate negotiated web of uses and shares in order to comply with the CRA and obtain renewal of its license.

South Carolina's contention that Duke's operational interests and interests in the CRA are "simply other ways of describing Duke's interests as a large water user" is wrong for similar reasons. SC Br. 49. The CRA is not simply about Duke's water use, as any perusal of its wide-ranging terms and conditions reveals.[9] Duke's interests are qualitatively different from those of an entity focused on keeping or increasing its water use.

The argument that Duke is a mere user of water also ignores Duke's rights and obligations as an impounder of water. In times of drought, the natural flow of the Catawba would result in only a trickle of water reaching South Carolina. There would be no water to apportion absent Duke's FERC-licensed dams and reservoirs. See, *e.g.*, NC App. 13a, 14a-15a. South Carolina, accordingly, is seeking the apportionment not of the natural flow of the Catawba River, but of waters available solely because they have been impounded by Duke's operation of its Catawba-Wateree project pursuant to its FERC license. As an impounder of water, Duke has concrete interests in that water – interests of

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[9] Portions of the massive CRA are appended to NC's brief in opposition to the motion for leave to file bill of complaint. Duke renews its offer to provide the Court with the document on CD or in hard copy if the Court wishes to review it.

ownership and management – that are determined and regulated by federal and state law. See *supra* at 25-26, 31-33. In a very real sense, it is only Duke and its federal license that make both the existence of this case and any remedy possible.

As the foregoing makes clear, Duke's peculiar interests, if recognized by this Court, could not conceivably open this case to intervention by significant numbers of Catawba water users or, indeed, any other private parties. No one is similarly situated or possesses analogous interests. Duke's particular interests – arising from its FERC license and the associated federal and public interests, including the CRA, its presence in both States, and its role as impounder of substantial quantities of water in both States – ensure that there is no one similarly situated or with comparable interests.

Moreover, if the Court were to allow other intervenors, Duke has been and is committed to coordinating with all parties to reduce any increased litigation burden resulting from the participation of private litigants. Duke's experience and knowledge with respect to the facts relevant to equitable apportionment is a benefit that outweighs any incremental burden from Duke's participation.

Duke's interests in the Catawba, indeed, are exceptional even among FERC licensees. The Catawba-Wateree project is massive, including eleven reservoirs and thirteen hydroelectric facilities throughout the River basin that runs through two States. Duke plainly is not just a very large user, as South Carolina and the United States imply. Its interests are both unique and uniquely important.

4. The Special Master's Determination That Duke's Intervention Would Be Beneficial Was Well Within Her Discretion.

Last, South Carolina and the United States make the straw man argument that Duke's possession of the information about the Catawba River's flow is not sufficient to permit intervention. SC Br. 53; US Br. 20 n.3. Duke made no such argument; it rested on the full set of interests articulated above, supplementing that showing with the point that its party status would facilitate the production of relevant information and expertise. Duke does not simply "possess information" about the Catawba's flow; its operations determine and control that flow and its license will determine its terms. And, Duke's participation is essential to the formulation and implementation of any remedy in this action. Duke manages the impounded water that would allow apportionment. And, Duke is bound by its federal license and its terms would have to be addressed in any apportionment. In light of these facts, neither *amicus* status nor receipt of a third party subpoena for document production (see US Br. 20 n.3) would protect Duke's interests.

In any event, the Special Master determined that she would benefit from the involvement of Duke as a party, both in conducting the litigation and in determining and implementing the remedy, if any. She correctly noted that Duke would "provide a direct link to the CRA negotiations process and the FERC proceedings that will foster 'a full exposition of the issues.'" *Interim Report* 30 (quoting *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21). Indeed, as the Special Master explained, "many of the same factors addressed in the [CRA] – such as natural flow,

existing uses, and effect of drought conditions – would be considered in an apportionment inquiry." *Id.* Where, as here, there is no constitutional impediment to a party's intervention, the Special Master should have discretion to decide that the litigation would benefit from a party's participation.

In sum, Duke has compelling interests that will be directly affected by any equitable apportionment of the Catawba and that are not adequately represented by either party State. In addition, Duke is uniquely situated to assist the States and the Court's exploration of all facts relevant to deciding the issues underlying equitable apportionment.

CONCLUSION

For the foregoing reasons, this Court should accept the Special Master's recommendation and grant Duke's motion to intervene.

Respectfully submitted.

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March 9, 2009

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No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING, *et al.*,
Defendants.

OFFICE OF THE SPECIAL MASTER

SEVENTEENTH MEMORANDUM OF SPECIAL MASTER ON PETITION TO INTERVENE OF BASIN ELECTRIC POWER COOPERATIVE

April 2, 1999

Add. 2

No. 108, Original

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1998

STATE OF NEBRASKA,
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v.

STATE OF WYOMING, *et al.*,
Defendants.

OFFICE OF THE SPECIAL MASTER

SEVENTEENTH MEMORANDUM OF SPECIAL MASTER ON PETITION TO INTERVENE OF BASIN ELECTRIC POWER COOPERATIVE

On March 26, 1999, I issued an order granting Basin Electric Power Cooperative's ("Basin") petition to intervene in this proceeding as a party for the limited purpose of protecting its water rights and equitable interests in the Laramie River.[1] This memorandum lays out the rationale for granting Basin's motion.

Basin filed its petition to intervene on August 13, 1998.[2] More than ten years into the case, participat-

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[1] Order (Mar. 26, 1999) (Docket Item No. 1318).

[2] Basin Electric Power Cooperative's Petition to Intervene, Memorandum in Support ("Basin's Memorandum") and Response to Nebraska's Amended Petition (Aug. 13, 1998) (Docket

ing actively as an *amicus curiae*, Basin takes the case as it stands. Basin's petition was opposed by the United States and the State of Nebraska, but the State of Wyoming acknowledged that Basin should be permitted to intervene if "Nebraska is allowed to pursue her changed position with respect to the [Missouri Basin Power Project] and if any party successfully challenges Wyoming's ability to raise Basin's contract defenses."[3]

Basin's petition comes against a backdrop of developments in the case, including water administration developments in Wyoming, a new Nebraska interpretation of the relationship between the 1978 Settlement Agreement[4] and the North Platte decree, the granting of summary judgment to the United States removing the Corn Creek issue from this case,[5] shifting alignments among the parties with the result that the United States is now approaching the issues more with Wyoming as a co-defendant than as a co-plaintiff with Nebraska, and an open door to considering an apportionment of the Laramie downstream of Wheatland, Wyoming, following the Court's opinions in 1993 and 1995.

Item No. 1232). Basin's Petition has been fully briefed and discussed during a telephone conference on November 4, 1998. *See* Transcript of Proceedings 11/4/98 (Docket Item No. 1290).

[3] State of Wyoming's Response to Basin Electric Power Cooperative's Petition to Intervene at 11 (Sept. 25, 1998) (Docket Item No. 1251).

[4] *See infra* note 6.

[5] *See* Sixteenth Memorandum of Special Master on the United States' Motion to Dismiss and Motion for Summary Judgment at 26, 32 (Mar. 26, 1999) ("Sixteenth Memorandum") (Docket Item No. 1347).

In 1993, the Supreme Court opened the door for Nebraska to bring a modification case to achieve an apportionment of the lower Laramie River between the State of Wyoming and the State of Nebraska.[6] The Court stated: "We express no view as to whether, upon a proper showing of injury, incorporation of the settlement agreement into the North Platte decree would be appropriate."[7] Thus, the Court left open a question that has become critical to the Laramie River issues in this case, namely whether protections and injunctions will be built into the North Platte decree at the conclusion of this proceeding to safeguard the rights secured by the 1978 Settlement Agreement.

Since that time, Basin has essentially been caught in the crossfire of litigation theories and strategies between the parties as described in more detail below.[8] The evolution of the case since the Court's decision in 1993 suggests that we will proceed to trial on Laramie River issues, that Basin's operations on the Laramie and its stake in Laramie waters are key to

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[6] *See Nebraska v. Wyoming*, 507 U.S. 584, 597-98 (1993). The Court was referring to an Agreement of Settlement and Compromise (Dec. 4, 1978) ("1978 Settlement Agreement") signed by several parties, including the United States, Nebraska, and Basin, but not by Wyoming. (The 1978 Settlement Agreement is attached to the Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion (Sept. 11, 1987) (Docket Item No. 23).) Wyoming's revised posture regarding that settlement agreement, discussed further below, is the reason for my granting the United States' motion for summary judgment with respect to the potential Corn Creek project on the Laramie River. *See* Sixteenth Memorandum at 25-26 (Docket Item No. 1347).

[7] *Id.* at 598.

[8] *See infra* pp. 7-10.

the disposition of those issues, that neither Wyoming nor Nebraska can adequately represent Basin as *parens patriae*, and that evidence Basin can offer may be important to crafting the final decree in this case and to my recommendations whether the Court should in some manner incorporate the 1978 Settlement Agreement into the North Platte decree. I have, therefore, concluded that Basin should be a party to these proceedings to represent its interests in the Laramie River Basin in order to protect its rights under the 1978 Settlement Agreement.

A. BACKGROUND

Basin is the project manager and operating agent of the Missouri Basin Power Project ("MBPP"), a consortium of consumer and publicly owned utilities supplying power in eight states, including Nebraska and Wyoming. In 1980, MBPP completed building the Grayrocks Reservoir on the Laramie River pursuant to Wyoming permits. Grayrocks Reservoir supplies water to the Laramie River Station, a large coal-fired steam electric power generating plant. During the 1970's, several parties sued in federal district court to enjoin the construction of the reservoir and power plant.[9] Wyoming was not a party to either of the two lawsuits involved in that challenge and did not, therefore, participate in the 1978 Settlement Agreement resolving that litigation and setting out terms and conditions that permitted the construction and operation of Grayrocks and the possible construction of Corn Creek.

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[9] *See* Sixteenth Memorandum at 7 (Docket Item No. 1347); *see also* Basin's Memorandum at 2-4 and footnotes therein (Docket Item No. 1232).

The 1978 Settlement Agreement[10] limited Grayrocks' consumptive use to 23,250 acre-feet per year, specified the water uses for the project, limited water intake structures in design and implementation for project purposes, and called for the measurement of releases and flows from Grayrocks Reservoir. Under the 1978 Settlement Agreement, Basin established a trust fund to set up *amicus* the Platte River Whooping Crane Critical Habitat Maintenance Trust to protect endangered and threatened species in the North Platte watershed. For the purposes of this proceeding, the most important terms of the 1978 Settlement Agreement require year-round releases of certain flows from Grayrocks Reservoir to the mouth of the Laramie River (section 4), and provide for a modification of those flows in the event the proposed Corn Creek project is built (section 5).[11]

Until recently, although Basin has made the required deliveries to the mouth of the Laramie River and has declared its intention to continue doing so, Wyoming refused to guarantee those releases.[12] In the past three years, however, that situation has substantially changed. In 1995, Basin applied to the Wyoming Board of Control to change the use of its appropriation for Grayrocks Reservoir, requesting a reallocation of uses for irrigation and fish and wildlife purposes. The state Board of Control granted the application on August 23, 1995. In 1997, Basin was awarded a secondary permit to protect agreed-upon water releases from Grayrocks Reservoir to the

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[10] *See supra* note 6.

[11] *See* Sixteenth Memorandum at 5-6 for a description of the Corn Creek project (Docket Item No. 1347).

[12] *See id.* at 19-26 for a history of these litigation postures and their impact on the proceedings.

mouth of the Laramie River. Finally, the Wyoming State Engineer has revised its water administration procedures for the lower Laramie River to protect the minimum flow releases set out in the 1978 Settlement Agreement.[13]

Because of Wyoming's changed stance toward Basin's water rights on the Laramie, I have granted the United States' motion for summary judgment on the Corn Creek issue.[14] I have also determined, however, that this resolution of the Corn Creek issue does not dispose of all Laramie River issues and that the door is open for Nebraska to seek to modify the North Platte Decree for a specific apportionment of Laramie lower flows beyond Grayrocks' protected releases under the 1978 Settlement Agreement.[15] I have further determined that the question of how Corn Creek depletions would be accounted for under the decree must be postponed to the time when Corn Creek is constructed and the parties fail to agree on accounting for its incremental depletions.[16]

This is the framework for admitting Basin as a party into these proceedings.

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[13] For more detailed descriptions of the recent Wyoming administrative developments favorable to Basin's contractual obligations under the 1978 Settlement Agreement, see Basin's Memorandum at 5-8 (Docket Item No. 1232); Nebraska's Response to Basin Electric Power Cooperative's Petition to Intervene at 10-13, exs. A-D (Sept. 25, 1998) (Docket Item No. 1252); Reply of Basin Electric Power Cooperative to Responses to Petition to Intervene at 4 (Oct. 2, 1998) ("Basin's Reply") (Docket Item No. 1256).

[14] *See* Sixteenth Memorandum at 17-32 (Docket Item No. 1347).

[15] *See id.* at 26, 32.

[16] *See id.* at 30-31.

B. ANALYSIS

There is a long and colorful history to Basin's efforts to intervene in these proceedings. Basin's first motion to intervene was filed on April 13, 1987.[17] In my Seventh Memorandum, I denied that motion without prejudice on April 1, 1998.[18] The standards for deciding on intervention in this original action are set out in the Seventh Memorandum and are incorporated by reference.[19] With respect to Basin in particular, I found its situation at the time to be analogous to that of the City of Philadelphia in *New Jersey v. New York*.[20] At that time, Wyoming declared itself ready and willing to defend Basin's interests and its "ability to use the Laramie River."[21] The common interest between Basin and Wyoming, according to Wyoming, rested on their shared view that the Laramie had been completely apportioned between Wyoming and Colorado[22] and that, therefore, "the Laramie River is exempt from apportionment in the decree."[23] That critical underpinning for Wyoming and Basin's position in this case disappeared in

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[17] Motion of Basin Electric Power Cooperative for Leave to Intervene, Memorandum in Support of Motion and Answer (Apr. 13, 1987) (Docket Item No. 14).

[18] Seventh Memorandum of Special Master at 8-12 (Apr. 1, 1998) ("Seventh Memorandum") (Docket Item No. 60).

[19] *Id.* at 2-4; *see also* Owen Olpin, Special Master, First Interim Report at 7-8 (June 14, 1989) ("First Interim Report") (Docket Item No. 140).

[20] *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

[21] Transcript of Proceedings 10/1/87 at 129 ("Salt Lake Transcript") (Docket Item No. 29).

[22] *See Wyoming v. Colorado*, 259 U.S. 419 (1922).

[23] Salt Lake Transcript at 42-43 (Docket Item No. 29).

1993 when the Court determined that all Laramie flows had not been previously apportioned.

I accorded Basin status as an active *amicus*,[24] and Basin has indeed been a regular and important participant in this proceeding, appearing at hearings and filing briefs and memoranda.

On March 29, 1989, Basin petitioned for reconsideration of its motion for leave to intervene or, in the alternative, renew its prior motion to intervene.[25] Basin had changed its mind about Wyoming being able to represent its interest because of Wyoming's stated position during oral argument on Wyoming's first motion for summary judgment that, although Wyoming would administer water released from Grayrocks in compliance with Wyoming water law, Wyoming would not guarantee administration under the terms of the 1978 Settlement Agreement.[26] I informed the Court that I would defer ruling on Basin's reconsideration motion until I firmly established Wyoming's stance.[27]

The evolving litigation stances of the parties in the following years and the evolution of the issues in the case suggested that Basin may indeed not be adequately represented by its nominal *parens patriae*, Wyoming. Rather, it seemed that because they were co-signatories to the 1978 Settlement Agreement, it

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[24] *See* Seventh Memorandum at 11-12 (Docket Item No. 60).

[25] Petition of Basin Electric Power Cooperative for Reconsideration of Its Motion for Leave to Intervene and of Certain Parts of the Decision Contained in the Tenth Memorandum of the Special Master (Mar. 29, 1989) (Docket Item No. 120).

[26] *See* Sixteenth Memorandum at 20-23 (Docket Item No. 1347).

[27] *See* First Interim Report at 13 (Docket Item No. 140).

was perhaps Nebraska and Basin that had a common interest in upholding the terms of that agreement, an interest not shared by Wyoming as a non-signatory.

Following the Court's determination in this case in 1993 that the Laramie River had not been fully apportioned in the Court's 1922 Laramie River decree in *Wyoming v. Colorado*[28] and that Nebraska could seek a North Platte decree modification with respect to the Laramie—thus rejecting the joint position of Wyoming and Basin that the Laramie had been fully apportioned—I alerted the Court to this change in Basin's position as the "child" of a *parens patriae*:

> During the course of these proceedings, it has become apparent that Wyoming and Basin Electric have opposing interests on some key questions .... Nebraska and Basin Electric have certain identities of interest, especially the notion of substantial injury to Nebraska on the Laramie on account of upstream developments. Thus, I have reopened the door for Basin Electric to petition to intervene as a party, but to date it has expressed contentment with its "position as the roving child of various parens patriae." July 27, 1994 Transcript at 230 (Mr. Weinberg for Basin Electric) (Docket Item No. 688).[29]

Basin nonetheless continued to appear content with its role as an *amicus*. On December 20, 1995, I issued an order directing Basin to describe its interests in Laramie River issues and explain how and by

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[28] *Wyoming v. Colorado*, 259 U.S. 419 (1922).

[29] Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings at 21 n.52 (Sept. 9, 1994) (Docket Item No. 699).

which party those interests would be represented.[30] In response, Basin described its interests and stated that "each of its principal interests is shared by at least one party that can be expected to represent it adequately."[31]

Basin has now changed its mind and determined that it must intervene for the limited purpose of protecting its Laramie rights because of a new litigation stance Nebraska has taken concerning the relationship between the 1978 Settlement Agreement and the North Platte decree.[32] Following the Wyoming administrative changes that accorded protection of Basin's rights to make the necessary deliveries to the mouth of the Laramie under the 1978 Settlement Agreement,[33] Nebraska made clear its position that the settlement agreement did not affect the North Platte decree and that any depletions from the Laramie River for the MBPP project should be counted against Wyoming's 25% apportionment of the natural flows of the North Platte River in its pivotal reach between Guernsey Reservoir and Tri-State Dam.[34]

None of the parties can act as *parens patriae* for Basin in protecting its Laramie interests. At one time in this litigation, it appeared that Nebraska

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[30] Order (Dec. 20, 1995) (Docket Item No. 814).

[31] Basin Electric's Memorandum in Response to Special Master's Order of December 20, 1995 at 2 (Jan. 12, 1996) (Docket Item No. 824).

[32] *See* Basin's Memorandum at 8-9 (Docket Item No. 1232).

[33] *See* discussion *supra* pp. 5-6; Sixteenth Memorandum at 25-26 (Docket Item No. 1347).

[34] *See, e.g.*, Nebraska's Reply to State of Wyoming's Response to Basin Electric Power Cooperative's Petition to Intervene at 4-5 (Oct. 5, 1998) (Docket Item No. 1260); Sixteenth Memorandum at 28-31 (Docket Item No. 1347).

would act in the interests of the settlement agreement, but now Nebraska appears to see a tension between the 1978 Settlement Agreement and the equitable apportionment.[35] In any event, Basin's water rights are administered under Wyoming law, not Nebraska law, and it would be unusual, to say the least, for one state to act as *parens patriae* over another state's citizen.

The United States has not taken an active role in protecting Basin's interests at any time in this proceeding. Basin articulated this:

> If any party was in a position truly to represent the interests of Basin, it was the United States. The Attorney General's proxy executed the settlement agreement on behalf of the Federal parties. When these proceedings were instituted, had the United States not suffered what Ed Weinberg styled an attack of total amnesia, it might have appropriately filled the office of *parens patriae* for Basin. The interests of the United States—which has guaranteed loans of approximately half a billion dollars in relation to the Missouri Basin Power Project—and the interests of Basin in sustaining the settlement agreement and securing the project's rights in the waters of the Laramie are closely aligned. But the United States was slow out of the gate to understand this and never caught up.[36]

Wyoming cannot take on the role of *parens patriae* for Basin because it was not involved in the 1978 Set-

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[35] *See* Basin's Memorandum at 8 (Docket Item No. 1232); Basin's Reply at 3-4 (Docket Item No. 1256).

[36] Basin's Reply at 5 (Docket Item No. 1256).

tlement Agreement and might yet have to weigh and balance competing Wyoming interests. The United States argues that "Wyoming now better represents Basin Electric's interests than it did in 1988"[37] and that Basin "should continue to be the 'roving child of various parens patriae.'"[38] But, Wyoming's standing or right to protect Basin's interests in the 1978 Settlement Agreement, to which Wyoming is not a party, is at least vulnerable to challenge. In addition, if language is to be written into the decree at the conclusion of this proceeding to protect Basin's and Nebraska's rights to deliveries to the mouth of the Laramie River, it will likely take the form of an injunction against Wyoming. Wyoming can hardly be put in the position of presenting evidence to support an injunction against itself.

Following the Court's 1993 opinion, opening the lower Laramie to a potential equitable apportionment, and the Court's 1995 opinion allowing pleadings to that effect, the need for Basin to speak for its own interests has become apparent. These developments have served to distinguish Basin's interests from those of the City of Philadelphia in *New Jersey v. New York*.[39] Basin has a "direct stake" in the Laramie River issues,[40] and Basin's evidence and participation are central to resolving these issues. I find that no party can fully represent Basin as *parens patriae* and that, as this litigation has evolved, Basin's

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[37] United States' Brief in Opposition to Basin Electric Power Cooperative's Petition to Intervene at 4 (Sept. 18, 1998) (Docket Item No. 1247).

[38] *Id.*

[39] *See* discussion *supra* p. 7 & note 20.

[40] *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); see discussion *supra* pp. 4-6 for a summary of Basin's interests.

status has become *sui generis* in the history of parties attempting to intervene in original jurisdiction cases. In addition, the policy considerations that limit private-party participation in original proceedings do not come into play in a situation like this where Basin enters the case for a limited purpose and has no appropriate *parens patriae*. As Basin has noted, no party "has suggested that permitting Basin to intervene for the limited purpose requested . . . would cause any problems or be injurious to the interests of any party."[1]

C. CONCLUSION

For all of the above reasons, my order of March 26, 1995, admitted Basin as a party in these proceedings to represent its interests in the Laramie River.

/s/ Owen Olpin/ by SBC
Owen Olpin
Special Master

Dated: April 2, 1999
k:\sbc\o&m\17th Memo (3-99)

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[1] Basin's Reply at 1 (Docket Item No. 1256).